

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

VERONICA BIEHNER, a single person,

Plaintiff,

v.

DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, an agency of the
State of Washington, KATE ORLANDO
and "JOHN DOE" ORLANDO and their
marital community, DAWN
FLAMMANG and "JOHN DOE"
FLAMMAND and their marital
community,

Defendants.

CASE NO. 13-5491 RJB

ORDER ON MOTION FOR
SUMMARY JUDGMENT

This matter comes before the Court on Defendants' Motion for Summary Judgment. Dkt.

23. The Court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

On June 20, 2013, Plaintiff Veronica Biehner filed this case alleging that Defendants breached their duty to provide all material information to the state court in dependency

proceedings concerning her son, they acted recklessly in pursuing a dependency when they were aware of an “extensive history of unfounded allegations” based on her son’s “history of false allegations,” and violated her constitutional rights. Dkt. 1, at 4. Plaintiff’s son, a minor, will be referred to in this order as “Z” in accord with Local Rule W.D. Wash. 5.2(a)(2).

Defendants now move for summary dismissal of all claims. Dkt. 23. For the reasons set forth below, Defendants’ motion should be granted.

I. FACTS

On May 3, 2012, the state’s Department of Social and Health Services (“DSHS”) filed a Dependency Petition regarding Z in Pierce County, Washington Superior Court, Juvenile Court Division. *Dependency of: Z*, D.O.B. 2/11/99, Pierce County, Washington Juvenile Court number 12-7-00964-7; filed in this case at Dkt. 26, at 12-17. The allegation of dependency was based on the following:

1. Veronica Biehner is the mother of Z. Michael Hurd is the presumed father of Z. He is listed on Z’s birth certificate.
2. Z has previously been placed in foster care from 11-6-09 to 12-17-10 and was dependent from 2-23-10 until 6-20-11. Z was previously placed into care due to physical abuse by his mother. His mother also yelled, used profanity towards him and withheld his dinner as a means of punishment.
3. During the previous dependency, Michael Hurd, Z’s father, did not engage in any services and indicated that he is not a placement resource for Z. Mr. Hurd did not maintain contact with the department and only visited with Z sporadically.
4. On 3-22-12 [Child Protective Services (“CPS”)] received a referral from Z’s school counselor indicating that Z is reporting physical abuse by his mother as well as neglect. Since Z started school this year his mother has told the school the Z is a liar and that she can’t trust him. Z indicates that he does not have food for lunch.
5. On 3-22-12 the school reports that a month prior the mother and Z got into a conflict and she kicked him out of the car. Z walked back to his doctor’s office and mother called the police. The police intervened and had Z return to the car.
6. On 3-22-12 the school reported that Z is on an [Individual Education Plan (“IEP”)] and is in special education. The teacher reported the Z came to school with a small bruise on his face and he reported that his mother punched

- 1 him. He said that he has had the worst week and on Tuesday (3-13-12) he and
2 his mother got into a fight about cleaning the bathroom. He indicated that she
3 tried to punch him and missed and she punched him again and hit him in the
4 face with a half fist using her knuckles.
- 5 7. On 3-22-12 Z reported that he recorded the incident and mother screaming at
6 him on his watch and mother took his watch and threw it away. During the
7 argument she also grabbed him on his arm and left red marks.
- 8 8. On 3-22-12 Z reported that his mother has tried to kick him down the stairs
9 and he is not allowed to leave the home outside of school time. He has to stay
10 in his room and does not get dinner. His mother will not let him make his
11 own lunch and on this date he had a bag of dried top ramen for lunch.
- 12 9. On 3-22-12 Z indicates that he prefers foster care to being with his mother. Z
13 said his step father is always at work when these incidents occur and he is not
14 able to be protective.
- 15 10. On 3-23-12 CPS went to school and interviewed Z. He indicated that his
16 mother has hit, punched, and kicked him. He indicates that his mother
17 punishes him if he does not clean well enough and that she kicks him out of
18 the home if she is mad at him.
- 19 11. On 3-26-12 the social worker attempted to schedule a meeting with mother.
20 Mother was combative over the phone, refused to meet with the worker,
21 indicated the worker could not come to her home and indicated that Z is a liar.
- 22 12. On 4-3-12 after numerous attempts to contact mother and engage her in
23 services the social worker was able to reach mother by phone. Mother refused
24 to provide any collateral information to the social worker but did agree to
participate in voluntary services. Mother did not show for her scheduled
meeting with the voluntary services worker and the department continues to
have concerns about physical abuse of Z.
- 13 13. On 4-10-12 the social worker went to mother's home. The step father was
14 home and said that Z does not misbehave when he is at the home. He
15 indicates that he has seen mother yell at Z and that Z yells at mother. He
16 indicates that due to his work schedule he rarely sees Z when he is at home.
- 17 14. On 4-30-12 Z was interviewed again at school. He continues to disclose
18 physical abuse by his mother. He indicates that it is ongoing and that he is not
19 able to stop her. Z indicated that on Saturday he did not clean the bathroom to
20 mother's standards and she pushed him into the tub, grabbed him by the back
21 of his shirt and hurt him.
- 22 15. On 4-30-12 Z reported that he and his mother are having to move out of the
23 step father's home due to marital issues. He does not know where they are
24 going to live but there will no longer be any protective adult in the home to
ensure Z is safe.
- 16 16. Mother has a founded referral from 2009 for physical abuse. Mother has been
17 the subject of 10 CPS referrals alleging physical abuse and neglect of Z.
- 18 17. Michael Hurd has not provided any ongoing support to Z and is not a resource
19 for him.

- 1 18. The following services have been offered during the previous dependency to
2 prevent out of home placement: voluntary services, parenting and anger
management assessment, in home counseling services, and FAST.
- 3 19. On 5-1-12 Z's mother was contacted by CPS to obtain his medication. His
4 mother said, "I'm not giving you jack shit" and hung up on the CPS
supervisor. Mother was asked three times to provide Z's medication and
5 refused.
- 6 20. On 5-1-12 Z's mother came into the DCFS office and was yelling and
inappropriate in the lobby. Mother was asked to leave several times and she
7 refused. Law enforcement was called and they issued a 30 day no contact for
8 mother and the DSHS building. Mother cannot enter the building for 30 days
for any reason.
- 9 21. On 5-1-12 mother called the Area Administrator's secretary. Mother was
belligerent, verbally abusive, and inappropriate. Mother made many
10 derogatory comments about the CPS supervisor and was unable to de-escalate
herself.
- 11 22. On 5-1-12 Z's mental health provider, Greater lakes, was contacted. Dr. Poe,
who treats Z, indicated that he has been tapering Z off his lithium and the only
other medication Z is on was prescribed through a paid clinical trial that
12 mother is participating in and Dr. Poe is not in support of Z's taking the
clinical trial drug.

12 Dkt. 26, at 13-15. The petition was submitted by Defendant Kate Orlando. Dkt. 26, at 17.

13 A shelter care hearing was held and an order entered on May 18, 2012. Dkt. 26-1, at 1-9.
14 Plaintiff was represented by counsel at the hearing. Dkt. 26-1, at 1. Plaintiff contested having Z
15 removed from her care. *Id.* The court issued an order and stated that it "did not make a finding
16 of reasonable efforts, but the family volatility is so great that the child shall remain in shelter care
17 until in-home services can be put in place." Dkt. 26-1, at 3. The court ordered Z be placed in
18 foster care "until in-home services can be put in place." Dkt. 26-1, at 5. On July 17, 2012, the
19 state moved for dismissal of the petition, because dependency had not been established. Dkt. 26-
20 1, at 11.

21 About eight months later, on March 4, 2013, the state filed a Child in Need of Services
22 ("CHINS") Petition in regard to Z. *In the Interest of Z, D.O.B. 2/11/99*, Pierce County,
23 Washington Superior Court, Juvenile Court Division number 13-7-00591-7; filed in this case at
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Dkt. 26-2, at 1-3. This petition was also filed by Defendant Kate Orlando. Dkt. 26-2, at 3. A hearing on the CHINS petition was held. Dkt. 24. Z was placed in foster care and Z's maternal grandmother's home was going to be assessed as a relative placement. Dkt. 25.

On March 14, 2013, the state filed a Dependency Petition in regard to Z. *Dependency of Z, D.O.B. 2/11/99*, Pierce County, Washington Superior Court, Juvenile Court Division number 13-7-00675-1; filed in this case at Dkt. 26-2, at 5-11. This petition was also submitted by Ms. Orlando. Dkt. 26-2, at 11. The allegation of dependency was based on the following:

1. Veronica Biehner is the mother of Z. Michael Hurd is the presumed father of Z. He is listed on Z's birth certificate.
2. Z has previously been placed in foster care via dependency action twice previously (11-6-09 to 12-17-10 and was dependent from 2-23-10 until 6-20-11, and again 5-1-12 to 5-30-12 via shelter care). Z is currently in care via a CHINS petition that was filed on 3-4-12 with a CHINS contested fact-finding hearing currently scheduled for 3-15-12. DSHS intends on withdrawing the CHINS petition as a result of the filing of this dependency petition.
3. Z has reported to CPS that the level of conflict in the home with his mother has increased significantly over several months. This conflict led on one occasion to charges being filed against Z for an alleged assault against Ms. Biehner. The conflicts have led to over a dozen police contacts initiated by the mother, Z, or other concerned persons.
4. At the CHINS hearing on 3-13-13, Ms. Biehner used vulgar language to describe an Assistant Attorney General in the midst of leaving the courtroom (she said "shut the fuck up you mother fucking cunt"). The Court directly addressed Ms. Biehner and advised her of the need to maintain proper behavior and decorum in the courtroom. Ms. Biehner did not appear receptive to the Court's direction. Ms. Biehner had also stated under her breath in open court while seated at counsel table at the Assistant Attorney General "go to hell."
5. Ms. Biehner appears to be unable to control her anger towards department employees and law enforcement and has exhibited a lack of willingness to curtail such behaviors even in open court when directed by the Judge/Commissioner.
6. DSHS filed the CHINS in an effort to attempt to engage the family in conflict-resolution given its increasing concerns regarding Z's safety in the family home given the number of law enforcement contacts and the mother's safety given the alleged assault by Z against his mother.
7. Ms. Biehner has made it abundantly clear in open court (for the CHINS and in the [At Risk Youth Petition ("ARY")]) that she has no desire nor intention in

1 engaging with DSHS and thus the voluntary, out-of-home, conflict-resolution
2 option of the CHINS does not continue to be a viable one.

3 Dkt. 26-2, at 6-7. The petition then goes on to discuss multiple law enforcement reports of
4 responding to the family's home. Dkt. 26-2, at 7-10. These reports included allegations of both
5 Plaintiff and Z physically abusing one another and Plaintiff locking Z out of the house for
6 extended periods in January, February, and March of 2013. Dkt. 26-2, at 7-9. Law enforcement
7 also reported that it also responded to a call that Z was threatening to kill himself. Dkt. 26-2, at
8 9. The petition further provided that "[s]ince 2008, the Department has received 25 intakes,
9 including allegations of physical abuse/neglect as well as Ms. Biehner calling in to request
10 family reconciliation services ("FRS")." Dkt. 26-2, at 10.

11 On March 25, 2013, Z's foster home contacted Defendant Dawn Flammang, who was a
12 Department of Children and Family Services ("DCFS") social worker who was assigned to Z's
13 case. Dkt. 25, at 3. The foster home stated that Z was to be removed immediately. Dkt. 25, at 3.
14 Ms. Flammang was able to get them to agree to keep him until the March 29, 2013 shelter care
15 hearing. Dkt. 25, at 3.

16 On March 27, 2013, Ms. Flammang was notified that Z had come home from school with
17 a fever, so his foster parent canceled his mental health appointment. Dkt. 25, at 3.

18 On Friday, March 29, 2013, a shelter care hearing was held. Dkt. 26-2, at 13. Plaintiff
19 contested having Z removed from her care. Dkt. 26-2, at 13. Plaintiff was represented by
20 counsel, and testified at the hearing. *Id.* and Dkt. 24, at 3.

21 At 4:35p.m., while Ms. Flammang was sitting outside the courtroom with Z and his
22 grandmother, the state's attorney told them that the court had denied placement with Z's
23 maternal grandmother and that Z would need to go back into foster care. Dkt. 25, at 3. The
24 DCFS placement desk was notified about ten minutes later. Dkt. 25, at 3. Z's prior foster family

1 was unavailable, so Z and Ms. Flammang went to the DSHS office. Dkt. 25, at 4. No placement
2 could be found in Pierce County. *Id.* Around 7:15 p.m., a placement was found in Snohomish
3 County, and Ms. Flammang took him up there, arriving around 10:00 p.m. *Id.*

4 On April 1, 2013 around 7:15 a.m., Ms. Flammang emailed Z's school and informed
5 them that Z would not be in school that day and indicated that further information would follow.
6 Dkt. 25, at 4. Ms. Flammang also emailed Z's principal later that day. *Id.* Later that day, staff
7 from Z's group home contacted Ms. Flammang and notified her that Z was sick. *Id.* Z requested
8 permission to be seen by a doctor. *Id.* Z's maternal grandmother took him to the Everett Clinic
9 in Smokey Point. *Id.*

10 On April 2nd, 3rd, and 4th, Ms. Flammang was in contact with Z's school, mental health
11 provider, and therapy provider, informed them that Z would not be attending appointments,
12 discussed his current living situation, and indicated that more information would be forthcoming.
13 Dkt. 25, at 4-5.

14 On April 4, 2013, the court issued an order requiring Z continue in out of home
15 placement. Dkt. 26-2, at 15. The order provided:

16 Ms. Biehner filed an ARY (and Z requested a CHINS) in order to access services
17 however Ms. Biehner has refused DSHS' attempts to offer additional services
18 even though Ms. Biehner has told the Court that the services she has in place "are
19 not working" and that Z beats her on a regular basis; Z reports he feels unsafe in
20 his mother's home due to her unpredictable anger . . . Ms. Biehner and the school
21 have told the court that Z takes no responsibility/blame for his actions/behaviors
22 and places fault with all others but himself – the Court finds that Ms. Biehner
23 behaves this way as well; . . . the Court is concerned as to what happens behind
24 closed doors of the family home . . . the escalating episodes of violence (Z's
having two assault charges for allegedly assaulting Ms. Biehner) and the
increasing law enforcement contacts with the family add to the Court's concern in
considering in-home placement and the safety to its family members . . . the Court
finds that the family home environment is far too volatile at this time for in-home
placement of Z for both Z and Ms. Biehner's safety.

1 Dkt. 26-2, at 16. The court noted that “there was considerable testimony that Z is not a reliable
2 reporter about events at home and school and thus his credibility is doubtful.” Dkt. 26-2, at 16.
3 The court found that “the Sumner School District and Sumner Middle School (Connections
4 Program) are meeting Z’s educational needs. Stability and structure are needed for Z and it is in
5 his best interest to remain in this school.” Dkt. 26-2, at 17. The court denied placement with Z’s
6 maternal grandmother because she resided out of this school’s district. Dkt. 26-2, at 16-17. The
7 order also provided that DSHS “is responsible for coordinating the student’s
8 educational/therapeutic/medical /dental information and programming and Ms. Biehner shall not
9 interfere with these efforts. Both parties [were ordered to] timely give notice to the other of all
10 scheduled appointments.” Dkt. 26-2, at 17.

11 On April 5, 2013, Plaintiff’s counsel filed a Motion for Review Hearing in the
12 dependency action. *Dependency of Z, D.O.B. 2/11/99*, Pierce County, Washington Superior
13 Court, Juvenile Court Division number 13-7-00675-1; filed in this case at Dkt. 26-2, at 24. In
14 this motion, Plaintiff notified the Court that Z had been placed in a Snohomish County group
15 home, was not attending Sumner Middle School, had missed mental health and therapy
16 appointments, and that the DSHS staff had not informed Plaintiff of the medical examination that
17 was done on April 1. Dkt. 26-3, at 1-4. Plaintiff argued that the court should return Z to her
18 care. *Id.* Z was ordered back into his mother’s care on April 11, 2013, pending further hearing.
19 Dkt. 26-3, at 14.

20 On April 12, 2013, Z was placed in the home of his maternal grandmother, who resides in
21 Snohomish County. Dkt. 25, at 5. His grandmother enrolled him in a school, got him mental
22 and other health care. Dkt. 25, at 5-6.

23 Plaintiff filed this case on June 20, 2013. Dkt. 1.
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1 In the pending motion, Defendants argue that Plaintiff's claims should be dismissed because
2 the state and individual defendants in their official capacities are entitled to Eleventh
3 Amendment immunity, the individual defendants are absolutely immune, and are also entitled to
4 qualified immunity. Defendants also move for dismissal of plaintiff's state law claim of
5 negligent investigation. Dkts. 23 and 27. Plaintiff opposes the motion. Dkt. 26. The motion is
6 ripe for decision.

7 **II. DISCUSSION**

8 **A. SUMMARY JUDGMENT STANDARD**

9 Summary judgment is proper only if the pleadings, the discovery and disclosure materials
10 on file, and any affidavits show that there is no genuine issue as to any material fact and that the
11 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is
12 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
13 showing on an essential element of a claim in the case on which the nonmoving party has the
14 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue
15 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find
16 for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
17 (1986)(nonmoving party must present specific, significant probative evidence, not simply "some
18 metaphysical doubt."). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a
19 material fact exists if there is sufficient evidence supporting the claimed factual dispute,
20 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty*
21 *Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors*
22 *Association*, 809 F.2d 626, 630 (9th Cir. 1987).

23 The determination of the existence of a material fact is often a close question. The court
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1 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –
 2 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect.*
 3 *Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor
 4 of the nonmoving party only when the facts specifically attested by that party contradict facts
 5 specifically attested by the moving party. The nonmoving party may not merely state that it will
 6 discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial
 7 to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson*, *supra*).
 8 Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not
 9 be "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

10 **B. ELEVENTH AMENDMENT IMMUNITY**

11 The Eleventh Amendment to the United States Constitution bars a person from suing a
 12 state in federal court without the state's consent. *See Seminole Tribe of Florida v. Florida* 116
 13 S.Ct. 1114, 1131 (1996); *Natural Resources Defense Council v. California Dep't of*
 14 *Transportation*, 96 F.3d 420, 421 (9th Cir. 1996). Eleventh Amendment immunity extends to
 15 state agencies. *Pennhurst State Sch. & Hosp. v. Holdeman*, 465 U.S. 89, 101-102(1984).
 16 Eleventh Amendment immunity is not automatically waived in actions brought under 42 U.S.C.
 17 § 1983. *Quern v. Jordan*, 440 U.S. 332 (1979).

18 DSHS has not waived the protection of the Eleventh Amendment. *Edgar v. State*, 92
 19 Wn.2d 217 (1979). Defendants' motion should be granted and Plaintiff's claims against DSHS
 20 should be dismissed.

21 Further, neither states nor state officials acting in their official capacities are persons for
 22 purposes of 42 U.S.C. § 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 48, 71 (1989).
 23 Because they are not persons within the meaning of § 1983, Plaintiff's claims against the any of
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1 the named individuals acting in their official capacities should be dismissed.

2 **C. ABSOLUTE IMMUNITY**

3 “Absolute immunity is extended to state officials, such as social workers, when they are
4 performing quasi-prosecutorial and quasi-judicial functions.” *Tamas v. Department of Social &*
5 *Health Services*, 630 F.3d 833 (9th Cir. 2010) (citing *Caldwell v. LeFaver*, 928 F.2d 331, 333
6 (9th Cir. 1991)(naming advocacy to the decisionmaker and execution of a court order as
7 examples)). “Social workers are not afforded absolute immunity for their investigatory conduct,
8 discretionary decisions or recommendations,” however. *Id.*

9 To the extent that Plaintiff brings claims against Defendants for the “discretionary quasi-
10 prosecutorial decisions to institute state court proceedings to take custody away” from Plaintiff,
11 Plaintiff’s claims should be dismissed. *Beltran v. Santa Clara County*, 514 F.3d 906, 908 (9th
12 Cir. 2008). Defendants are entitled to absolute immunity. *Id.*

13 To the extent that Plaintiff asserts that Defendants made false statements in the
14 dependency petition, the Defendants are not entitled to absolute immunity, and the claim will be
15 further analyzed below under Defendants’ claim for qualified immunity.

16 **D. QUALIFIED IMMUNITY**

17 In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the
18 conduct complained of was committed by a person acting under color of state law, and that (2)
19 the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or
20 laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other*
21 *grounds, Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to
22 remedy an alleged wrong only if both of these elements are present. *Haygood v. Younger*, 769
23 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

1 In order to state a claim under 42 U.S.C. § 1983, a plaintiff must set forth the specific
2 factual bases upon which she claims each defendant is liable. *Aldabe v. Aldabe*, 616 F.2d 1089,
3 1092 (9th Cir. 1980). Vague and conclusory allegations of official participation in a civil rights
4 violations are not sufficient to support a claim under § 1983. *Ivey v. Board of Regents*, 673 F.2d
5 266 (9th Cir. 1982).

6 Defendants in a Section 1983 action are entitled to qualified immunity from damages for
7 civil liability if their conduct does not violate clearly established statutory or constitutional rights
8 of which a reasonable person would have known. *Pearson v. Callahan*, 129 S.Ct. 808, 815
9 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity balances
10 two important interests: the need to hold public officials accountable when they exercise power
11 irresponsibly and the need to shield officials from harassment, distraction, and liability when
12 they perform their duties reasonably. *Harlow v. Fitzgerald*, 457 U.S. at 815. The existence of
13 qualified immunity generally turns on the objective reasonableness of the actions, without regard
14 to the knowledge or subjective intent of the particular official. *Id.* at 819. Whether a reasonable
15 officer could have believed his or her conduct was proper is a question of law for the court and
16 should be determined at the earliest possible point in the litigation. *Act Up!/Portland v. Bagley*,
17 988 F.2d 868, 872-73 (9th Cir. 1993).

18 In analyzing a qualified immunity defense, the Court must determine: (1) whether a
19 constitutional right would have been violated on the facts alleged, taken in the light most
20 favorable to the party asserting the injury; and (2) whether the right was clearly established when
21 viewed in the specific context of the case. *Saucier v. Katz*, 121 S.Ct. 2151, 2156 (2001). “The
22 relevant dispositive inquiry in determining whether a right is clearly established is whether it
23 would be clear to a reasonable officer that his conduct was unlawful in the situation he
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1 confronted.” *Id.* While the sequence set forth in *Saucier* is often appropriate, it should no longer
2 be regarded as mandatory. *Pearson v. Callahan*, at 129 S.Ct at 811. “The judges of ... the courts
3 of appeals should be permitted to exercise their sound discretion in deciding which of the two
4 prongs of the qualified immunity analysis should be addressed first in light of the circumstances
5 in the particular case at hand.” *Id.*

6 The privilege of qualified immunity is an immunity from suit rather than a mere defense
7 to liability, and like absolute immunity, it is effectively lost if a case is erroneously permitted to
8 go to trial. *Saucier v. Katz*, 121 S.Ct. at 2156.

9 *1. Violation of Constitutional Right?*

10 Plaintiff has failed to identify which constitutional right Defendants allegedly violated.
11 Plaintiff’s unverified Complaint merely says that Defendants “violated the constitution rights of
12 Veronica Biehner.” Dkt. 1, at 4. Plaintiff’s Response also fails to address the question. Her
13 “constitutional” claim should be dismissed on this basis. Further, to the extent that Plaintiff
14 makes a claim under the due process clause of the Fourteenth Amendment, her claim should be
15 dismissed.

16 “Substantive due process protects individuals from arbitrary deprivation of their liberty
17 by government.” *Costanich v. Department of Social and Health Services*, 627 F.3d 1101, 1110
18 (9th Cir. 2010) (*quoting Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir.2006)). The substantive
19 due process clause also protects the fundamental right of parents to make decisions concerning
20 the care, custody, and control of their children. *Troxel v. Grandville*, 530 U.S. 57, 64 (2000).
21 While a parent's constitutional liberty interest in the maintenance of the familial relationship
22 exists, this right is not absolute. *Woodrum v. Woodward County*, 866 F.2d 1121, 1125 (9th Cir.
23 1989). The interest of the parents must be balanced against the interests of the state in protecting
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1 the child. *Id.*

2 Plaintiff argues that “the allegation in the complaint is that Defendant Kate Orlando made
3 not only false statements, but also incomplete and inaccurate statements, in a dependency
4 petition that was signed under penalty of perjury. . .” Dkt. 26, at 5. Plaintiff, however, fails to
5 provide any evidence to support her allegation. Her assertions in the pleadings (the unverified
6 Complaint and Response to the Motion for Summary Judgment) do not meet her burden under
7 Rule 56.

8 Moreover, Plaintiff fails to point to any authority that Defendants failure to house Z in
9 Pierce County, get Z to his school or health care provider appointments in the week or so period
10 after the shelter care hearing and the time when he entered his maternal grandmother’s care
11 violated Plaintiff’s constitutional rights. Her claim should be dismissed.

12 2. *Clearly Established?*

13 Plaintiff has failed to point to any evidence that her constitutional rights have been
14 violated. No further analysis is required. *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1060
15 (9th Cir. 2006). Defendants are entitled to qualified immunity on Plaintiff’s constitutional
16 claims.

17 **E. STATE LAW CLAIM FOR NEGLIGENT INVESTIGATION**

18 Washington courts recognize a claim for negligent investigation of child abuse
19 allegations under RCW 26.44, *et. seq.* *Roberson v. Perez*, 156 Wn.2d 33, 44–45 (2005).
20 Negligent investigation claims are “cognizable only when DSHS conducts a biased or faulty
21 investigation that leads to a harmful placement decision, such as placing a child in an abusive
22 home, removing the child from a nonabusive home, or failing to remove the child from an
23 abusive home.” *Id.*, at 45.

1 Plaintiff's claim for negligent investigation should be dismissed. Plaintiff has failed to
2 point to any evidence that DSHS conducted a "biased or faulty investigation." *Roberson*, at 45.
3 Further, she has made no showing that the investigation led to a "harmful placement decision."
4 *Id.*

5 **III. ORDER**

6 Therefore, it is hereby **ORDERED** that:

- 7 • Defendants' Motion for Summary Judgment (Dkt. 23) is **GRANTED**; and
8 • This case is **DISMISSED**.

9 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
10 to any party appearing *pro se* at said party's last known address.

11 Dated this 22nd day of May, 2014.

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14 ROBERT J. BRYAN
15 United States District Judge
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